



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 669**

IN THE MATTER OF DONALD P. BESSO

Appearances: Karen Beth Gray
Counsel for Petitioner

Leonard Bello
Counsel for Respondent

Commissioners: Wagner, Ch., Roach, Dolan, and Todd

Presiding Officer: Commissioner J. Owen Todd, Esq.

DECISION AND ORDER

I. Procedural History

On November 25, 2002, Petitioner initiated these proceedings by issuing an Order to Show Cause (OTSC) under the Commission's Rules of Practice and Procedure.¹ The OTSC alleged that Respondent, Donald P. Besso (Besso) violated G.L. c. 268A, § 3(a)² by offering Town of Wareham Zoning Board of Appeals (ZBA) member David Boucher a \$100 restaurant gift certificate for official acts Boucher took concerning a Cumberland Farms' special permit application.

On December 11, 2002, Besso filed an Answer to the OTSC, generally denying the allegations. A pre-hearing conference was held on January 31, 2003. On January 24, 2003, the parties submitted Stipulations of Fact (Stipulation).

An evidentiary hearing was held on February 27, 2003. After conclusion of the evidentiary portion of the hearing, Petitioner submitted a legal brief on April 24, 2003. Respondent did not submit a brief. The parties presented closing arguments before the full Commission on June 18, 2003.³ Deliberations began in executive session on June 18, 2003.⁴

In rendering this Decision and Order, each undersigned member of the Commission has considered only the testimony, the evidence in the public record, including the hearing transcript, and the arguments of the parties.⁵

II. Findings of Fact, Including Stipulations (as noted below)

1. Besso owns and resides at property on Depot Street, Wareham (Stipulation).
2. Besso has resided on the property for 30 years, and owned the property for 23 years. Before he acquired title to the property, his grandmother, and, later, his mother had owned the property.
3. Besso is employed as a Maintenance Supervisor for the Bourne Recreation Authority, a position he has held for twenty-one years.
4. David Boucher (Boucher) was, at all relevant times, an appointed member of the Wareham Zoning Board of Appeals (ZBA) (Stipulation).
5. Boucher resides approximately three-quarters of a mile "down the street" from Besso's residence.
6. Besso's property abuts property owned by Cumberland Farms (Cumberland Farms). (Stipulation).
7. On or about June 14, 2000, Cumberland Farms Dairy filed an application for a special permit (Application) from the ZBA to raze its existing building and replace it with a larger convenience store offering gasoline sales. (Stipulation).
8. On August 15, 2000, Cumberland Farms sent Besso notice that the ZBA scheduled a public hearing on the Application for September 13, 2000.
9. Besso first spoke to Boucher about the Application sometime prior to the September 13, 2000 ZBA public hearing.
10. Besso called Boucher because Boucher was a member of the ZBA.
11. Before Besso spoke to Boucher about the Application, Besso had never met Boucher and had no social relationship with him, although Besso's wife and Boucher's wife knew each other because their children attended the same school.
12. Besso opposed Cumberland Farms' proposal. (Stipulation)
13. During that initial conversation, Besso told Boucher that he---Besso---opposed the Cumberland Farms' project.
14. Besso believed that Cumberland Farms' proposal would decrease the value of his property.
15. Boucher informed Besso that Besso should write his concerns in a letter to the ZBA and present the letter and speak about his concerns at the ZBA meeting.
16. Besso circulated a petition among his neighbors.
17. On September 13, 2000, the ZBA held a public hearing on the Application. (Stipulation).

18. Besso spoke during the September 13, 2000 public hearing and expressed his opposition to the Application.

19. During this public hearing, Besso expressed his reasons for opposing the Application, including traffic, garbage, people from Cumberland Farms going onto his property, noise, gasoline tanks and gasoline fumes, and health reasons.

20. Some ZBA members expressed concern about the proposed expansion's impact on traffic in the area. (Stipulation).

21. It was Besso's understanding that the ZBA did not vote on the Application during the September 13, 2000 public hearing because the ZBA expressed the desire to review traffic in the area.

22. Sometime soon after the September 13, 2000 ZBA meeting, Besso again called Boucher to ask about the procedures and how the traffic review would unfold.

23. During this conversation, Besso reiterated the concerns he expressed at the September 13, 2000 ZBA meeting.

24. During this conversation, Boucher told Besso that he was well aware of the traffic issues and the problems associated with the Cumberland Farms' site because he lives approximately one mile from the site.

25. Besso believed that Boucher opposed the Application because Boucher told him that the site was not suitable for that project.

26. The ZBA held a meeting on January 24, 2001, during which it again considered the Application. (Stipulation).

27. At this meeting, Besso presented his petition and expressed his concerns.

28. On January 24, 2001, the ZBA members voted 3 to 2 to approve the Application. (Stipulation).

29. Boucher voted to deny the Application. (Stipulation).

30. The 3 to 2 vote resulted in a denial of the Application because a supermajority (four of the five-member ZBA) was required for the approval of a special permit. (Stipulation).

31. Besso first heard that the Application had been denied based on a conversation Mrs. Boucher had with Mrs. Besso.

32. The official notice from the ZBA about the decision on the Application stated, "SPECIAL PERMIT GRANTED." The decision attached to the notice stated, "The Board finds to grant a Special Permit to construct a new building with a gas station. VOTE: 3-2-0. REASON: The Special Permit is granted with the attached conditions."

33. The ZBA's decision contained twelve (12) conditions, including restrictions that deliveries be made during non-peak hours; requirements about maintenance; and engineering requirements.

34. After Besso received official notice about the January 24, 2001 ZBA vote on the Application, Besso called Boucher and asked him about the special permit having been denied when the notice stated that the special permit was granted.

35. Boucher told Besso that the notice was a mistake and that the permit had actually been denied.

36. Besso subsequently went to see his attorney, Leonard Bello, to ask him about the special permit.

37. As a result of Besso's question, Mr. Bello called the chairman of the ZBA and confirmed that the ZBA had made an error in stating on the decision that the special permit was granted.

38. Soon thereafter, Besso called Boucher to inform him about Mr. Bello's conversation with the chairman of the ZBA. During his conversation with Boucher, Besso also asked Boucher about the procedures that would follow the special permit decision.

39. On February 6, 2001, Cumberland Farms filed an appeal of the ZBA denial in the Land Court, requesting the Court to annul or reverse the denial, remand the matter to the ZBA, and direct the ZBA to approve the special permit. (Stipulation).

40. On June 8, 2001, the Land Court remanded the matter to the ZBA for a re-vote. The Land Court's Order of Remand (Order) stated that the matter was remanded to the ZBA "for reconsideration of its decision on plaintiff's special permit application, without reopening the public hearing but at a meeting open to the public and duly noticed." The Order further stated that on or before July 11, 2001, the ZBA "render and file such decision in conformity with the requirements of G. L. c. 40A, § 9, with the Wareham town clerk" and the Land Court.

41. Section 9 of G. L. c. 40A sets forth numerous requirements regarding the issuance of special permits. Among other requirements, "Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law; and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use." In addition, "The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question . . . and setting forth clearly the reason for its decision and of its official actions."

42. Subsequent to the Land Court's remand, Besso received notice that the ZBA would hold a hearing on the Application.

43. Besso again called Boucher to ask him what he (Besso) could do during the hearing.

44. Besso had new information, including video tape of traffic conditions, flooding conditions, and approximately sixty (60) pictures of the area.

45. Boucher told Besso that Besso would not be allowed to introduce new material at the hearing.

46. Boucher told Besso that the ZBA would have a re-vote and that Boucher did not know how the vote would turn out.

47. Besso considered selling his property to Cumberland Farms because he did not know how the vote would turn out. If the vote were in favor of the Application, which would allow Cumberland Farms to build, Besso would move.

48. Besso informed Boucher that he was considering selling his property if the re-vote went in favor of Cumberland Farms.

49. Prior to the July 11, 2001 ZBA meeting, Besso instructed his lawyer to contact Cumberland Farms about purchasing his property.

50. Cumberland Farms offered to purchase a portion of Besso's property for \$50,000.

51. Besso rejected the offer, and made a counter offer that Cumberland Farms purchase all of his property or none of it because he did not want to live next to a gas station.

52. Besso contacted realtors to obtain an appraisal of his property.

53. Besso ultimately rejected Cumberland Farms' offers to purchase his property.

54. Boucher reviewed a traffic report prepared by Cumberland Farms and a traffic report prepared by an engineer the Town hired.

55. During the July 11, 2001 hearing, Boucher stated that he was concerned with on-site circulation, and that in a prior plan, for Cumberland Farms' West Wareham site, the applicant had prepared a traffic circulation on-site plan, but had not done one for this site.

56. On July 11, 2001, the ZBA held a re-vote that resulted in an outcome identical to the January vote, 3 to 2. (Stipulation).

57. Boucher again voted to deny the Application. (Stipulation).

58. Boucher voted against the Application because of the effects the Cumberland Farms' proposal would have on the off-site traffic circulation.

59. The ZBA decision on the July 11, 2001 vote stated, "MOTION FAILS DUE TO LACK OF A 4/5ths VOTE." Accordingly, the Application was denied.

60. The ZBA decision stated the following reason:

"Although the traffic study by the applicant and supported by the Town's consultant that a new exit lane directly North onto Route 6 & 28 will improve traffic light intersection levels of service, it failed to take into account movement *on-site*. The lay out of the pumps in particular and the layout of the parking, loading, and fueling in general effect the enter and exit lanes from Depot Street, will cause queuing problems and will constitute in an adverse way to any existing bad intersection. Cars and pumps will block the lanes and therefore cause entering or exiting traffic to be in conflict with traffic movement on Depot Street raising new problems not solved by the new exit lane on Route 6 & 28."

61. During the nearly year-long process in which Cumberland Farms applied to obtain the special permit (from June 2000 when the Application was first filed through the ZBA's second denial in July 2001), Besso had numerous conversations with Boucher (Stipulation), after normal working hours.

62. Boucher recalled that these conversations were lengthy because Besso was not "a quick study" about the issue.

63. These conversations included Boucher's explanations to Besso about the application and hearing process regarding the special permit. (Stipulation).

64. During the conversations Besso and Boucher had concerning the Application, Besso did not ask Boucher how he would vote on the Application.

65. In addition to Boucher, another member of the ZBA voted both times against the Application.

66. Besso never attempted to communicate with the other member of the ZBA who voted against the Application.

67. Besso never offered a gift to the other ZBA member who had voted against the Application.

68. Sometime after the July 11, 2001 ZBA re-vote of the Application, Besso went to the Daniel Webster Inn and Restaurant in Sandwich, Massachusetts and purchased a \$100 gift certificate for Boucher. (Stipulation).

69. Approximately three days after the July 11, 2001 ZBA denial of the Application, Besso telephoned Boucher and thanked him for the significant time Boucher had given him regarding the permitting process, and for the efforts Boucher had put into the hearing.

70. During this telephone conversation, Besso asked Boucher if he could come over to Boucher's house to show him a book about the construction of the Cape Cod canal.

71. Approximately, forty-five minutes after that telephone call, Besso arrived at Boucher's home and offered Boucher the \$100 gift certificate he had purchased from the Daniel Webster Inn and Restaurant. (Stipulation).

72. When Besso went to Boucher's home to offer him the gift certificate, Besso believed that the Cumberland Farms' special permit process was over.

73. During his meeting with Boucher at Boucher's home, Besso told Boucher that the offer of the gift certificate could not be construed as a payoff because the vote had already occurred.

74. Boucher believed that Besso offered the gift certificate to thank him for listening to Besso and taking the time to answer his many questions about the special permit process.

75. Boucher stated that, during all of their conversations, Besso never asked Boucher how he intended to vote and Boucher never told Besso how he intended to vote.

76. Besso testified that he offered the gift certificate to Boucher because Boucher had taken time to answer his questions and that he was grateful for being allowed to interrupt Boucher at dinner time and during Boucher's family time. Besso testified that he would not have been so generous with his family time.

77. Boucher refused to accept the gift certificate and told Besso he could not accept the gift certificate. (Stipulation).

78. In refusing to accept the gift certificate, Boucher told Besso that it was not appropriate for him to accept it.

79. After Boucher refused to accept the gift certificate, Besso offered the gift certificate to Boucher, as a birthday present for Boucher's wife.

80. Boucher again refused to accept the gift certificate.

81. Besso left the gift certificate at Boucher's residence.

82. While Besso was meeting with Boucher at Boucher's house, after Besso offered the gift certificate, they discussed the book Besso brought with him about the construction of the Cape Cod canal.

III. Decision

Petitioner must prove, by a preponderance of the evidence,⁶ each of the following elements:

- (1) Besso, directly or indirectly, gave, offered **or** promised;
- (2) Anything of substantial value;
- (3) To a municipal employee;
- (4) For or because of any official act;⁷
- (5) Performed or to be performed by such an employee.

There is no dispute that Besso offered something of substantial value to a municipal employee. The gift certificate was worth \$100, Boucher, as a member of the ZBA, was a municipal employee,⁸ and Besso offered the gift certificate by communicating his offer directly to Boucher and leaving the gift certificate at Boucher's home. At least in Besso's mind, as discussed below, he believed that the process before the ZBA had been completed when he offered the gift to Boucher. Accordingly, if the gift were proved to be "for or because of any official act," it would be for an "official act **performed**" rather than "to be performed."⁹ There is no evidence that Besso offered the gift in advance of Boucher's future actions, official or unofficial.

The issues in this case are: whether there were specific "official act(s)" and whether the offer was "for or because of any official act" (or acts) performed, which, as we discussed in *In re LIAM*, 2003 SEC ____, constitutes intent to violate § 3(a). Thus, the questions to be answered are whether there were identifiable official acts and was the gift certificate given, as we concluded in *LIAM*, "substantially or in large part" as a reward for the acts.¹⁰ For the following reasons, we conclude that Petitioner has not met its burden of proof.

Official Act

The definition of "official act" is "any decision **or action in** a particular matter"¹¹ As we will discuss further below, because a violation of § 3(a) must be linked to an "official act," the relevant official act (or acts) must fit within the statutory definition. The Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 407-408 (1999), emphasized, in analyzing the federal analog to G. L. c. 268A, § 3, that to prove a violation, there must be a link to a particular "official act," as that term is defined in the statute.¹²

Votes

First, Boucher's votes were decisions "in a particular matter" (the Application) and, therefore, were "official acts" as defined. Petitioner has alleged in the OTSC that the gift certificate was "for official acts Boucher took as a ZBA member *concerning* Cumberland Farms' special permit application."¹³ Petitioner has proved by a preponderance of evidence that Boucher participated in the votes.

Traffic

Petitioner has also argued that there were official acts in addition to the votes. These included Boucher's official participation in the ZBA meetings regarding the Application and reviewing traffic studies. Boucher expressed his concerns about traffic

issues and reviewed traffic reports that had been prepared as part of the hearing process.

Zoning boards of appeal typically review the documents and hearing testimony an applicant and interested parties submit. Such actions are all part of the decision-making process in a particular matter. Here, the ZBA reviewed traffic studies and based its denial, in part, on traffic issues. The second ZBA decision, coming after the July 11, 2001 hearing, emphasizes traffic concerns and states that there was a traffic study which the ZBA considered in its decision on the Application. Under G. L. c. 40A, § 9, the ZBA may impose conditions in a special permit and must state “the reason for its decision and of its official actions.” Such actions fit within the defined phrase “actions in a particular matter.” Accordingly, Petitioner has proved that Boucher’s review of the traffic issues also was an official act or acts.

Providing information about the special permit process

Finally, Petitioner argues that Boucher’s actions outside of the ZBA meetings, including answering Besso’s numerous questions about the ZBA process and providing him advice about how to express his concerns, also constituted “official acts.” For the following reasons, we conclude, on these facts, that Petitioner has not proved these actions by Boucher were “any decision or action in a particular matter” under the plain meaning of that phrase in the definition.

Petitioner argues that the type of advice Boucher provided amounts to constituent services which, in the case of state legislators, the Commission has construed to be “acts within [a legislator’s] official responsibility.”¹⁴ But Petitioner did not present evidence about the official duties or the scope of the official responsibility of the members of this ZBA. Further, there was no evidence offered to support a finding that Boucher’s or the ZBA’s official duties include the provision of such advice, which was provided outside the time they spend in ZBA meetings. Accordingly, we conclude that Petitioner has not proved these actions to be “official acts.”¹⁵

“For or because of”

In analyzing intent, whether the gratuity was given “for or because of an official act performed,” we “weigh the totality of all of the circumstances surrounding the gratuity, drawing reasonable inferences from the circumstances.”¹⁶ The Commission may consider such factors as the subject matter of the pending particular matter and its impact on the giver, the outcome of particular votes, the timing of the gift, or changes in a voting pattern.¹⁷

In addition, we may consider, as we discussed in *LIAM*, the following factors, which are most relevant to this case: whether the gift was aberrational conduct for the giver; the nature, amount and quality of the gift; whether the gift was a business expense for the giver; to whom was the gift targeted; whether there was reciprocity; the existence of personal friendship; sophistication of the parties; and whether the gift is part of a repetitive occurrence. “We will consider whether the gratuity was given **substantially, or in large part, was motivated by** the requisite intent to influence a present or future official act of the public official or to reward a past action.”¹⁸ The

issue, therefore, is whether Besso offered the gift certificate substantially, or in large part, as a reward for Boucher's votes and review of the Application.

The outcome was very important to Besso and he spent considerable time and effort to oppose the Application. The vote ultimately supported Besso's goal and Besso sought to offer the gift certificate soon after the second vote. Boucher was one of the swing votes. But we also believe that while Boucher told Besso that the outcome of the second vote was not certain, there was no doubt in Besso's mind that Boucher opposed the Application and would vote against it.

Besso's chief defense is that his only motivation was to thank Boucher for the time Boucher provided, **outside** of the hearing, to give him guidance about the process. There is no evidence that Besso displayed a pattern of offering gifts to public officials. The gift was a single \$100 gift certificate for a restaurant meal. There is no evidence that this gift was any type of business expense for Besso. There is no evidence that this was part of a repetitive occurrence.

We find Besso's defense to be credible. His testimony on this point was very consistent. Besso's testimony about appreciating how he had interrupted Boucher's family time, at Boucher's home, was credible. While Boucher might be considered to be relatively sophisticated because he was a ZBA member and understood the process, Besso, although a long-time municipal employee in another town, was unsophisticated, at least at the beginning of the Application process, about how the ZBA operated. Although Besso showed an appreciation of Boucher's attention to some of the traffic issues that also were of great concern to Besso, the evidence shows that during their conversations, they discussed the procedure, rather than the substance of the Application.

We note that Besso did not offer any type of gift to the other ZBA member, who also voted both times against the Application. Besso knew little about the process and how to convey his concerns to the other ZBA members. Besso appreciated that he had interrupted Boucher's personal time and that Boucher freely provided him information.

Having reviewed the totality of the circumstances, we conclude that Petitioner has not proved, by a preponderance of the evidence, that Besso "substantially, or in large part was motivated by, the requisite intent to . . . reward" Boucher for his votes or his review of the traffic issues.

IV. Conclusion

We conclude that although there is evidence that Besso was grateful for Boucher's official and unofficial actions, Petitioner has not proved, by a preponderance of the evidence, that Besso's motivation for offering the \$100 gift certificate was substantially or in large part a reward for Boucher's *official* acts.¹⁹ We conclude that on these facts, Besso offered the gift certificate because Boucher was personally courteous to him, allowed him to interrupt his personal time, and provided him general information about the special permit process. None of these has been proved in this record to be official acts as defined in G. L. c. 268A, § 1(h).

We emphasize that we do not condone Besso's offer. We also acknowledge that, notwithstanding our conclusion that the evidence does not prove a nexus between the offer and the official acts, Boucher did the right thing by refusing to accept Besso's gift. By so doing, Boucher avoided the possibility of violating § 3(b). Such offers always involve a significant risk that, under particular facts, they will violate G. L. c. 268A.

V. Order

Because Petitioner has not met its burden, this matter is dismissed.

DATE AUTHORIZED: August 14, 2003

DATE ISSUED: August 21, 2003

SIGNED:

Augustus F. Wagner, Chairman
Christine M. Roach
Elizabeth J. Dolan
J. Owen Todd

¹ 930 CMR §§ 1.01(1)(a) *et seq.*

² "Whoever . . . directly or indirectly, gives, offers or promises anything of substantial value to any present . . . municipal employee . . . for or because of any official act performed or to be performed by such an employee . . . shall be punished by a fine" G. L. c. 268A, § 3(a).

³ 930 CMR § 1.01(9)(e)(5).

⁴ G. L. c. 268B, § 4(i); 930 CMR § 1.01(9)(m)(1).

⁵ Counsel for Petitioner was not involved in any way in the Commission's deliberations.

⁶ 930 CMR § 1.01(9)(m)(2).

⁷ "Official act, any decision or action in a particular matter or in the enactment of legislation." G. L. c. 268A, § 1(h).

⁸ “Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis” G. L. c. 268A, § 1(g).

⁹ *Scaccia v. State Ethics Commission*, 431 Mass. 351, 355-356 (2000); *U.S. v. Schaffer*, 183 F. 3d. 833, 842 (D. C. Cir. 1999).

¹⁰ *In re LIAM* 2003 SEC ____.

¹¹ Emphasis added.

¹² 526 U.S. at 408 (1999).

¹³ Emphasis added.

¹⁴ G. L. c. 268A, § 3(b); *EC-COI-92-2*.

¹⁵ Given the analysis in *Sun Diamond* and the Supreme Judicial Court’s adherence to that same analysis in *Scaccia*, we cannot agree with Petitioner’s reasoning based on the Commission’s former conclusions about “official acts” in *EC-COI-92-2*. As *EC-COI-92-2* indicates, the Commission once believed that “it is **unnecessary** to prove that gratuities given were generated by some specific act performed or to be performed.” (emphasis added). The Supreme Judicial Court’s holding in *Scaccia* has modified how we must apply § 3.

¹⁶ *In re LIAM* 2003 SEC ____.

¹⁷ *Scaccia* at 357.

¹⁸ *LIAM*, (emphasis added). The *LIAM* Decision and Order cites the following: “See, St. 1962, c.779, § 1. The preamble to G.L. c. 268A stated ‘A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.’ (emphasis added).”

¹⁹ When a gratuity is given “substantially, or in large part . . . to influence a present or future official act . . . or to reward a past” official act, in violation of § 3, “substantially, or in large part” does not necessarily mean the main, primary or only reason.